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Conference

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 RIO TINTO PLC,

4 Plaintiff,

5 v.

14 CV 3042 (AJP)

6 VALE, S.A. ET AL.,

7 Defendants.

8 -----x
9 New York, N.Y.
10 March 17, 2015
11 2:10 p.m.

12 Before:

13 HON. ANDREW J. PECK,

14 Magistrate Judge

15 APPEARANCES

16 QUINN EMANUEL

17 Attorneys for Plaintiff Rio

18 BY: MEGHAN A. MCCAFFREY MICHAEL J. LYLE

19 CLEARY GOTTLIEB STEEN & HAMILTON LLP

20 Attorneys for Defendant

21 BY: JONATHAN I. BLACKMAN LEWIS J. LIMAN

22 MISHCON DE REYA

23 Attorneys for DEFENDANT

24 BY: VINCENT FILARDO

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1 (Case called)

2 THE COURT: All right. The good news is your letters
3 seem to be getting shorter and having more agreement than
4 disagreement. The bad news for you all is I have a three
5 o'clock conference call, so we have a 2:55 hard stop. So let's
6 use our time wisely.

7 With respect to the agreed upon letters rogatory, you
8 want to hand them up or did you submit them via ECF as opposed
9 to the ones with the issue about redactions?

10 MR. BLACKMAN: Your Honor, I think a set was attached
11 to the ECF filing of the joint letter but we have another copy
12 to hand up.

13 THE COURT: OK. I think when my secretary printed it
14 out she didn't print the attachment.

15 (Pause)

16 THE COURT: All right. Does this, specifically, say
17 in here that BSGR, etc., consents?

18 MR. BLACKMAN: Yes, your Honor, it does. And for the
19 sake of good order, perhaps, the Court will ask their counsel
20 to confirm that but --

21 THE COURT: Your letter to me says that I was just
22 looking about it in terms of when it lands on the desk of the
23 senior master in London whether there is something in it that
24 will immediately tell him that all the parties including the
25 recipient of the requests are consenting to it.

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1 MR. BLACKMAN: I believe that they do.

2 MS. MCCAFFREY: Your Honor, at paragraph five, page
3 two, the parties have conferred and agreed to the terms of part
4 eight of the attached letter.

5 THE COURT: Wait. OK. But that's not anything that
6 my counterpart in the UK is going to see. That's what I was
7 looking for. In fact it's not like in the first paragraph. On
8 a quick read I don't see anything.

9 MR. BLACKMAN: I think your Honor may be right. And I
10 think our intention which may not have been done the right way
11 is that to have the consent in the application but --

12 THE COURT: Well, you know that's great for me. The
13 application is not going to be seen by the senior master. So
14 my suggestion is why don't you all revise it. And I know there
15 are certain formalities, so it may not be possible for you to
16 put it in the first page of the letter of request.

17 MR. BLACKMAN: I think that's an excellent suggestion
18 which we will do and bring it back to your Honor by filing it
19 later this week.

20 THE COURT: Okay. Just so you know, I won't be able
21 to sign it until Monday but I think the loss of three days will
22 be more than made up by you figuring out how, as close to the
23 first page of what the folks in the UK are going to see, you
24 know, we'll have that everybody is consenting to it.

25 MR. BLACKMAN: Your Honor, just for the sake of this

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1 record, I'd ask that you ask Mr. Filardo so it's clear at least
2 for the purpose of this Court that this is consented to and the
3 procedure that the Court just outlined will be followed.

4 MR. FILARDO: Good afternoon, your Honor.

5 My clients agree to the terms and scope of these
6 letters of requests.

7 THE COURT: And that they will not be opposed in any
8 way in the UK?

9 MR. FILARDO: That's correct, your Honor, agreed to
10 these.

11 MR. BLACKMAN: Thank you, your Honor.

12 THE COURT: All right. Now, as to the letters of
13 request with confidentiality, you want to hand me at least one
14 copy so I could see what the issue is or all of them as the
15 case may be?

16 (Pause)

17 MR. BLACKMAN: I think this is a set of all of them.

18 THE COURT: All right. I've got three. Is that what
19 I am supposed to have?

20 MR. BLACKMAN: Yes, I believe so.

21 THE COURT: OK. So why don't you tell me what it is
22 that's the problem.

23 MR. BLACKMAN: Well, your Honor --

24 THE COURT: And in specific I know what the general
25 problem is.

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1 MR. BLACKMAN: All right. I am looking at the
2 requests for -- letters of request to the senior master for
3 letters of request directed to Africa Risk Consultant
4 Livingston and Company and the issue is that in order to make
5 these very specific --

6 THE COURT: Counsel, counsel, paragraph and line. I
7 got the general issue and time is short today.

8 MR. BLACKMAN: Sure. Understand, your Honor, For
9 example, if you turn to page 51, paragraph W it refers there to
10 an interview memorandum summarizing a conversation with a,
11 quote, very well placed official. It quotes what the official
12 said, and it says as referenced on pages four and 13 of your
13 report entitled The Political Landscape in Guinea dated 18
14 June 2010. And throughout each of these parts what we've done
15 is to quote the statement and reference, the page of the report
16 where it occurs in order to be specific. None of that in our
17 view is at all confidential. The statements themselves are
18 there and most of them are reflected in allegations in the
19 pleadings in this lawsuit or are evidence allegedly supporting
20 them and we see no reason why we should be having an issue
21 about filing these with the Court.

22 THE COURT: OK. So let me hear from Rio Tinto. Give
23 me your best paragraph here where the sky is going to fall if
24 this is public or quasi public.

25 MS. MCCAFFREY: Your Honor, I think even looking at

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1 the paragraph that Mr. Blackman referred you to there, the
2 issue becomes we certainly believe, as do our clients, in the
3 investigative firms who generated these reports that these are
4 highly confidential in nature. In fact, we've made every
5 effort to protect the confidentiality of these reports. The
6 investigative firms they were only supposed to be disclosed to
7 Rio Tinto. They were not supposed to be provided to an third
8 parties.

9 THE COURT: OK. But my question is this. One way to
10 avoid public disclosure is for your client's contractual
11 relation with Africa Risk Consulting or former contractual
12 relation to allow us to bypass the Hague Convention by your
13 client asking Africa Risk Consultant to respond albeit
14 producing out of London but respond to a normal Federal Rules
15 document request, informal request, whatever you want to call
16 it. In other words, if they agree to respond to these letters
17 of requests without going through the Court then none of this
18 has to become public at least at this point.

19 If not, you know unless the counterbalance is you get
20 Africa Consulting to agree that it will not argue against a
21 watered down version of the request via the Hague Convention
22 and won't say it doesn't understand it or whatever. I mean, I
23 suppose one could say, you know, the interview memo
24 characterizing your conversation is referenced on pages four
25 and 13 without saying what it says per se. But I don't want to

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1 create -- I mean, I have never seen the investigative reports.
2 I don't know whether the senior master in London without the
3 consent of the -- we'll call it the target -- would honor that
4 or not. I don't know how one can do a letter of request in a
5 non public way. And you know, at least based on the first
6 example and with the fact that it certainly doesn't disclose
7 who the sources are, I am inclined to say there's a difference
8 between the confidentiality of the entire report and the
9 confidentiality of little snippets of it when used in a court
10 document.

11 MS. MCCAFFREY: Understood, your Honor. I think there
12 are two points on that. I think these aren't just small
13 snippets from these reports. They are letters of request cover
14 the vast majority of information that are contained in those
15 reports. So, they're effectively waiving the confidential --
16 that's effectively covering the vast majority of information
17 contained in those reports.

18 We understand -- I understand that what you're -- how
19 you're directing us and what you are getting at with this. I
20 think that's something that we have -- we've not spoken with
21 counsel for Vale about that being a potential. I think it's
22 something we --

23 THE COURT: It's really more a question of the
24 investigative firms, Africa Consulting and BTG Intelligence and
25 whoever else this is going to. Look, by agreement since this

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1 basically it seems to be and I've seen it for all of three
2 minutes, you know, all their backup raw material that led to
3 the investigative report, one can do that as a single request.
4 Give me all your backups to your interviews and anything else
5 that resulted in this report. That might or might not pass
6 muster here. If contested is likely not to pass muster in the
7 UK. And I don't want to take three months trying it that way
8 and find out that it's not specific. So you know, you pay a
9 price, so to speak, and you make a deal. You want to get them
10 to avoid the Hague Convention? See if these companies -- and
11 the good thing is, are all of these going -- well, at least the
12 ones going to England, I know and certainly under the prior
13 special senior master, that England is not France or Germany
14 shall we say. So, if there's consent, it might sail through.

15 MS. MCCAFFREY: Yes, sir.

16 THE COURT: If there isn't, then I've got to look at
17 what the record will be here, etc.

18 MS. MCCAFFREY: Understood. We'll -- if we can have
19 the opportunity to go back and speak to these investigator we
20 may be able to resolve these issue on our own.

21 THE COURT: All right. So what I am going to do is
22 give these back to Vale's counsel. I would like you, I know
23 it's six hours ahead already or five hours ahead in London but,
24 hopefully, by Monday you'll be able to report to the Court, if
25 not Vale, whenever Vale's patience runs out which if you pull

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1 the plug too soon may be counterproductive, submit what you
2 want just by letter, without filing anything at this point, not
3 ECF but the old fashioned way, and I will be putting the burden
4 on you to really show me and you may then have to file it with
5 the court under seal, the entire investigative report why this
6 gives the show away and/or how it is one can seal a Hague
7 Convention request which I've never heard of. You know, I
8 might be able to seal what I issue over here but it's going to
9 then get publicly filed in the UK. That as I understand it is
10 the general procedure.

11 MR. BLACKMAN: The only thing I'd add to that and
12 we're happy and hopeful that the plaintiff will get us what we
13 want is that actually, although, there are procedures for
14 somebody getting to letters rogatory that are filed with senior
15 master, they won't be on public file as a filing in this court
16 would be. And in the other jurisdictions like France they
17 certainly won't be. So to some extent this is in our view an
18 artificial problem but we wanted to get solved.

19 THE COURT: All right. We'll try to solve it. It is
20 my practice not to seal court orders. You know, parties can
21 file under seal whatever they want but there's this little
22 bitty thing called the First Amendment and the press right to
23 know. I've been through that before. And for me to actually
24 seal a court order as opposed to letting you file things under
25 seal you are going to have to show me something other than the

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1 parties have a confidential order and you designated the report
2 as "confidential".

3 So I think you all can get the message. It would,
4 certainly, be a lot smoother in general for the letters of
5 request to go out as agreed letters including agreed to not
6 only by the two parties to the U.S. litigation or all of the
7 parties in interest to the U.S. litigation but also by the
8 recipient who's basically saying I am covering my rear end by
9 going Hague but I am willing to comply and ask, in essence will
10 be asking the Court to order compliance as opposed to
11 noncompliance.

12 MR. BLACKMAN: Right. And clearly if Rio Tinto which
13 employed these firms agrees presumably they will agree and we
14 won't have an issue.

15 THE COURT: Right. OK. So you are going to work it
16 out. Good.

17 All right. I think the first issue that requires my
18 issue which continues with these investigative reports starts
19 on page three, paragraph Roman numeral V; is that correct? Is
20 there anything before that that wasn't agreed upon that
21 whatever say greed upon or we'll tell you about it next time we
22 have a problem? You don't need to clutter the transcript or
23 run the clock on it.

24 MR. BLACKMAN: I think that's correct, your Honor.
25 That is the redaction issue from these reports. And if I could

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1 speak to that briefly because I know that the clock is ticking.
2 These reports contain in various places redactions of the names
3 of witnesses. One of the most striking is the most recent one
4 that we received only a few weeks ago on March 2nd. It's the
5 December 1, 2010 project Vale report which is produced by one
6 of the terms called Executive Research. And this has in
7 various places references to individuals and on the page there
8 is simply a black line including on things that are really
9 quite significant, this report in particular seems to be the
10 source of much of the complaint, including the famous alleged
11 meeting of December 2008. And when you turn to this, they say
12 there's a meeting, the same source black and beginning of the
13 report talks about their sources being black. And these are
14 clearly percipient witnesses or at least witnesses with
15 discoverable information. In fact if you look at Rio Tinto's
16 interrogatory answers when we asked them I believe in response
17 to Interrogatory Number 11 for what their sources -- 12. I am
18 sorry. No, nine. Got it wrong. Interrogatory nine about this
19 meeting, the only person they listed in their answer other than
20 people from Vale and BSGR was this executive research and now
21 they won't tell us who the witness is. So, clearly, it's
22 discoverable and highly informant. And the fact that they say
23 they won't call this person, obviously, it's irrelevant.

24 So, the only thing they've raised there is to say,
25 well, this is highly confidential. And we say, yes. And it's

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1 also "attorney's eyes only" when the document was produced.
2 And we're quite happy to have that name given to us on the same
3 "attorney's eyes only" basis as the rest of the report. And
4 the notion that somehow that's not enough that these people are
5 in danger is really pretty off base. "Attorney's eyes only"
6 means that I am seeing it, Mr. Liman is seeing it, my
7 colleagues at Cleary Gottlieb are seeing it and three in-house
8 lawyers at Vale, full stop, no business people, no Mr. Stein --

9 THE COURT: I assume.

10 MR. BLACKMAN: -- and the other counsel. But they're
11 bound by the same rules that we are.

12 THE COURT: All right. Let me hear from plaintiff's
13 counsel.

14 MS. MCCAFFREY: Thank you, your Honor.

15 We disagree that the identity of these confidential
16 informants needs to be disclosed their identity is tangential
17 to the issues here in this case presented here. As
18 Mr. Blackman pointed out, we have identified the firm that it
19 has the knowledge relevant to the claim.

20 THE COURT: Well, thinking -- Heaven forbid this case
21 goes to trial, the investigative firm's knowledge of what
22 happened at a meeting is hearsay if offered for the truth.
23 It's offered for other purposes as to Rio Tinto's knowledge or
24 whatever, that's another matter. I am finding it difficult to
25 see how the house of cards is going to fall down if counsel get

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1 it. I admit that I am smiling as I said that because we've
2 just gone over the issue of whether the letters of request for
3 Hague Convention should have information from the investigative
4 report. So, I realize -- whatever. But this is not like a
5 criminal case. And frankly, even when I am sitting on the
6 other side of the Court on the criminal side, in order for
7 certain proceedings to be sealed, you can't just say there's a
8 risk of harm to the person because that's what happens to
9 people who talk, whatever. There's got to be much more of a
10 factual showing.

11 MS. MCCAFFREY: Yes, your Honor. Understood. I think
12 that there are several points here that you've just raised. I
13 think that first and foremost and as we discussed at the
14 February 5th hearing that we had Rio Tinto has no intention to
15 call any of these witnesses at trial. They have not been
16 identified by any of the other closing parties.

17 THE COURT: Because they don't necessarily know who
18 they are.

19 MS. MCCAFFREY: Understood, your Honor. But I think
20 the point here --

21 THE COURT: Assume this were a car accident case.
22 Let's take it back to something nice and simple. Car accident,
23 you hire an investigative firm to find out if there were
24 witnesses and the report has certain information. And you say
25 you don't need to know who those witnesses are because I am not

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1 calling them to trial. But it's similar to 26(A) disclosures
2 and other discovery. You are not calling them because they may
3 have told your investigator that your client's car ran the red
4 light and was going 90 miles an hour on a city street.
5 Defendant in that hypothetical would, certainly, be entitled to
6 know who the witnesses are.

7 MS. MCCAFFREY: Your Honor, understood. I think that
8 the defendant also has the resources and ability to conduct
9 their own investigations to figure out what happened.

10 THE COURT: OK. The request is granted. By the
11 defense and you are to produce unredacted copies "attorneys
12 eyes only".

13 MS. MCCAFFREY: Your Honor, may I raise just one
14 additional issue?

15 THE COURT: Yes. Except, generally, start with your
16 strongest argument. When you tell me they have the resources
17 to go and do an investigation at this point you are losing
18 points terribly.

19 MS. MCCAFFREY: Your Honor, I understand. I think my
20 one remaining point is there is significant harm that both
21 these confidential informants can face, as well as the
22 investigative forms here. I think the confidential informants
23 and the public remembered is very clear especially with respect
24 to the defendant's -- assignment very activity pursue any
25 adversaries.

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1 THE COURT: Are you suggesting that counsel for those
2 entities, Mr. Filardo or any other of the attorneys entitled to
3 do this are going to put their law license at risk by telling
4 their clients the names of these people?

5 MS. MCCAFFREY: No, sir, I am not suggesting that.

6 THE COURT: OK. Then how does it get from -- and
7 we'll pick on Mr. Filardo -- How does it get from Mr. Filardo
8 to his client if he is not breaching his duty an officer of the
9 court.

10 MS. MCCAFFREY: Because I think the next stop after
11 these confidential informants are identified is then they will
12 be seeking discovery from these confidential informants and it
13 will impact --

14 THE COURT: I'll worry about that when it comes to
15 that.

16 And, Mr. Blackman, you may have to show a much higher
17 need for anything that gets those names public via deposition
18 or letters rogatory than if you are merely to see who they're
19 talking about on the report. I understand the slippery slope
20 and I am warning you now that you are going to have to show
21 something a lot stronger than what you have here before you
22 will be able to go from, OK, now you know the names. They may
23 be people who are already on the deposition list because even
24 though they haven't listed them, you all know them as, you
25 know, whatever. You just don't know who is the person who told

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1 the investigators but you know certain people from your client
2 or the other clients. You may not get -- this is getting your
3 foot in the door and it's going to slam after that. So that
4 protects you at least for now on that.

5 MS. MCCAFFREY: Thank you.

6 MR. BLACKMAN: Thank you, your Honor.

7 THE COURT: OK. So that's the Court's order. Get it
8 done by Monday. Is that doable?

9 MS. MCCAFFREY: Yes, your Honor.

10 THE COURT: Good. OK. I think the next issue is
11 Quinn Emanuel and Weil Gotshal. And my inclination is to leave
12 that in abeyance, see what you get from Rio Tinto. Based on
13 the timing and the comments that appears to be saying I think
14 Mr. Lyle can confirm that they did not interview anybody. They
15 merely liaised with the reports.

16 MR. BLACKMAN: The only thing I would say to that,
17 your Honor, is after your Honor's ruling of December 9 which is
18 when you said, tell us about your investigations, which they
19 didn't want to do at all, although, they're clearly relevant,
20 particularly, to their limitations issue, after that they
21 amended their interrogatory answers. In their new amended
22 answer to our interrogatory 22 which asked about the basis for
23 the allegation in paragraph 146 of the complaint that they did
24 a thorough investigation and showed due diligence. They
25 identified the sets, OK. So we understand that --

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1 THE COURT: In the course of time.

2 MR. BLACKMAN: In the course of time Rio Tinto may
3 introduce --

4 THE COURT: Let me interrupt you. I assume, Mr. Lyle,
5 neither you nor your partners or former partners whether at
6 Weil or Quinn Emanuel and partners includes associates,
7 counsels, and etc., none of you guys are testifying, correct?

8 MR. LYLE: We are not testifying, your Honor.

9 THE COURT: So they can't sandbag you that way.

10 MR. BLACKMAN: We understand that and we appreciate
11 that. However, the work they did which is not privileged, not
12 the advice they gave but literally the work they did is
13 relevant to the diligence issue and timing.

14 THE COURT: If they did work then, presumably, it got
15 to Rio Tinto in some way and we have not taken that off the
16 table but at this point I am quashing the subpoenas to Quinn
17 and Weil without prejudice and you won't even have to pay the
18 \$50 a second time. If you have to reissue the subpoenas we'll
19 worry about that down the road.

20 MR. BLACKMAN: Can I just raise one point then, your
21 Honor?

22 THE COURT: Yes.

23 MR. BLACKMAN: I think this is almost the last thing
24 we have today. We -- the last time this issue was visited with
25 respect to Rio itself your Honor was not inclined to treat the

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1 production of Rio's documents dealing with these investigations
2 on any more expedited basis beyond the report that we already
3 have. And our problem is this, we have a pretty hard stop of
4 January 30 to get documents here and then there's going to be
5 privilege issues with which --

6 THE COURT: June 30.

7 MR. BLACKMAN: Misspoke. June 30. And there's going
8 to be a privilege waiver issue and what we are trying to do is
9 tee it up sooner rather than later.

10 THE COURT: I understand. And one of the advantages
11 among many others of predictive coding whatever name you want
12 to use, particularly, if it's a continuous active learning
13 process but even if it isn't is that you are going to be
14 getting the documents in waves and presumptively now that
15 you've got the protocol or whatever have actually started
16 moving toward. So you'll be starting to get waves and,
17 certainly, if the -- and I forget what the protocol says if
18 anything about when you are getting privilege logs there isn't
19 something in the protocol, work it out.

20 MR. BLACKMAN: It doesn't. That's the problem. It
21 doesn't. The concern we have --

22 THE COURT: I understand. Any reason not to do the
23 privilege logs on a rolling basis along with the production?

24 MS. MCCAFFREY: Your Honor, the EIS protocol
25 specifically calls for the production of privilege logs 30 days

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1 after the completion of discovery. That's been agreed upon by
2 the parties in this case.

3 THE COURT: Be careful what you agree to. If that's
4 what the order says, that's what it says. All I'll say further
5 on this issue is that if we have to go to the Quinn Emanuel or
6 Weil Gotshal files you are not going to have a long amount of
7 time to go through them. So that's going to be the pain for
8 the deferral. On this point I'm willing to defer.

9 MR. BLACKMAN: On that issue I don't want to re-argue
10 but what about just their bills? Those are sitting in a file.

11 THE COURT: No. Nope. Good try, but no.

12 All right. I think that completed the letter; yes?

13 MR. BLACKMAN: I believe it did, your Honor.

14 MR. LYLE: Yes, your Honor. The only other thing as
15 we did tell the Court we were going to review the documents
16 from BSGR which we have done. I had a brief conversation with
17 Mr. Filardo about those documents. We believe some of them are
18 responsive. We are going help work that out. If we are unable
19 to we'll be back before you with that.

20 MR. FILARDO: Your Honor, it is of course our position
21 that there are no further responsive documents to be produced.
22 We're happy to speak to counsel, have a brief meet and confer
23 and then to the extent we can't agree to swiftly bring it to
24 your Honor.

25 THE COURT: When do you all think you are going need

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1 to be back?

2 MR. BLACKMAN: Three weeks, your Honor.

3 MR. LYLE: That seems reasonable to us, your Honor.

4 THE COURT: Like the beginning of April. OK. Does
5 April 8 work for all of you? It is during Passover for those
6 who care but I won't make you eat bread. April 8 going once
7 twice, OK. You want two o'clock to make your travel easier?

8 MR. LYLE: Yes. Thank you, your Honor.

9 THE COURT: And I'd like the trend that the letters
10 are getting shorter and fewer disputes. Let's keep it up.

11 Just scheduling, twice this week and next the only day
12 I am going to be around is next Monday. So for the letters of
13 request, try very hard -- I mean the one that you are just
14 putting in a paragraph that says, we're all in agreement
15 including the recipient, that I expect I'll have latter this
16 week. As to the ones where you are talking to the
17 investigative firms, try very, very hard to get it in a
18 position where you could give me something to sign on Monday if
19 we're going the route that I've got to do a Hague request as
20 opposed to a completely informal way of working it out which is
21 certainly what the Court would suggest.

22 OK. Thank you. Usual drill, you'll split the
23 transcript however you've all been doing.

24 (Adjourned)